machinery assessment. There was considerable correspondence passing between Anderson and the DSS up to the period November 1990 when Anderson's pension was cancelled. At that time, his accountant wrote to the DSS asking that his pension be assessed on 'a current income basis'. He lodged a fresh application on 9 January 1990, and pension was granted with payment commencing 8 November 1990. Thereafter, the DSS wrote to Anderson on several occasions specifically asking to be advised if he had recommenced work at the college and, if so, what his wage would be. No reply was received. This situation persisted through 5 different letters sent to him between January 1991 and September 1992, and on each occasion he did not respond. Anderson maintained that the reason he did not reply was that he did not consider the requests relevant to his situation. He believed that his pension was assessed on his annual income as disclosed in his income tax returns. This was despite his request that he be assessed on current income earnings.

Income

Anderson also believed during that period (and this was found by the AAT) that his income would be assessed by taking account of deductions. Once again, this belief was erroneous since s.1072C provides that only income derived from a business may be reduced by specified expenses incurred in the course of deriving that income. That provision does not apply to income derived by an employee. Despite this, when the original calculation of the debt was reviewed by the authorised review officer, that officer took account of some deductions incurred in deriving his income from the college and reduced the debt to the amount currently in question of $11,205.60.

The AAT, referring to the Full Federal Court decision in *Secretary to DSS v Garvey* (1989) 53 *SSR* 711 noted that 'the definition of "income" in the Act does not permit the "negative yield" of one source of income to be offset against the yield from other sources'. Therefore, the AAT noted that even if he was under the impression that he could set off his farm losses against his earned income from his college employment, this was not open to him in accordance with the decision of the Full Federal Court.

The AAT went on to hold that, notwithstanding its findings that Anderson was an honest witness, he did not deliver his tax return to the office in August 1991 and the DSS did not receive a copy of it until 4 December 1992.

Recipient notification notices

The AAT noted that if the notices sent to Anderson advising him of relevant information were invalid, then the failure to respond could not be considered in any overpayment calculation. Accordingly, it became necessary to decide if those notices were valid notices. The AAT considered each of the notices in turn by reference to the applicable legislation at the time (the 1947 Act was repealed and from 1 July 1991, the 1991 Act came into force). Therefore, what had previously been notices under s.163 of the 1947 Act became notices issued pursuant to s.68 of the 1991 Act. Section 68(3) of the 1991 Act provided, until it was amended in 1991, that a notice issued under that section must *inter alia* specify that it is given under that section. However, by Act No. 194 of 1991, s.68(3)(e) was amended to say that the notice 'must specify that the notice is a recipient notification notice given under this Act'.

None of the notices used the word 'this is a recipient notification notice'. The AAT then considered a number of cases which had considered this issue. In *Peretti v Secretary to DSS* (1993) 77 *SSR* 1123 the AAT had distinguished the earlier case of *Secretary to DSS v Carruthers* (1993) 76 *SSR* 1100. In *Carruthers* the AAT had held a notice to be invalid because it had failed to comply strictly with the requirements of the legislation. However, in *Peretti*, the AAT had said that strict literal word-by-word compliance is not what is required, and distinguished *Carruthers* on the basis that the non-compliance there was on a matter of substance. Applying that to this case, the AAT here decided that the non-compliance with the strict literal words was no more than a mere formality and, indeed, the result was to provide a more meaningful explanation to Anderson in this case.

Decision

For these reasons, the Tribunal found that the 5 notices in question were valid and went on to affirm the decision to raise the debt.

[R.G]

Overpayment: conspiracy to defraud the DSS

SECRETARY TO DSS and KALWY
No. 9589
Decided: 5 July 1994 by B.A. Barbour, J.Campbell and I.Way.

The DSS had in May 1989 issued notices under s. 162 of the *Social Security Act* 1947 addressed to the Westpac Bank. The notices required the Bank to pay to the Commonwealth out of funds due to Kalwy an amount that the Commonwealth believed was owed to it in consequence of Kalwy's participation in a fraudulent conspiracy. The DSS alleged that Kalwy, a DSS officer at the time of the fraud, conspired with G, a CES officer, to falsely claim benefits in fictitious names thereby depriving the Commonwealth of some $40,000 between 1986 and 1989. The DSS further alleged that Kalwy received $27,099 of the proceeds of the conspiracy. The sum recovered pursuant to the notice to Westpac was $20,711.73.

History of prior proceedings

The decision under review was a decision of the SSAT made in August 1990 which set aside a decision of the DSS and remitted the matter for reconsideration in accordance with the direction that there was no evidence that Kalwy was indebted to the Commonwealth under s.246 of the *Social Security Act 1947*.

In *Kalwy* (1992) 67 *SSR* 950 the AAT found that Kalwy was a party to the conspiracy and had received proceeds of the fraud. It decided that he was indebted to the Commonwealth. On appeal, the Federal Court set aside the AAT's decision (*Kalwy* (FC) (No. 1) (1992) 70 *SSR* 996). The Court said it was not enough to find that Kalwy had been a party to the conspiracy; it was essential that the Secretary demonstrate that the amounts in question were paid to Kalwy and this had not been established. The matter was remitted to the AAT for re-determination.

On the rehearing the AAT ('the second Tribunal') found that Kalwy had received at least $27,000 from the proceeds of the conspiracy, and remitted the matter to the DSS for recovery of that sum. Kalwy again appealed the decision to the Federal Court, where Beazley J on 22 December 1993 remitted the matter for re-determination by a fresh panel of the

AAT. The second Tribunal's error was, said Beazley J, that it failed to consider the submission made as to Kalwy's financial position after the conspiracy, which evidence might have corroborated Kalwy's explanation of the increase in his bank accounts during the period of the conspiracy (*Kalwy* (FC) (No. 2) (1993) 77 *SSR* 1128).

The issues before the AAT

The AAT rejected a submission by the DSS that it was bound by findings previously made by the AAT and not set aside by the Federal Court. The matter was remitted because the error of not considering Kalwy's financial position after the conspiracy might have influenced the AAT's findings as to whether Kalwy was involved in the conspiracy. That evidence was also relevant to the question of whether Kalwy received proceeds from the fraud. It would be inconsistent with the Court's direction for the AAT to treat itself as bound by those findings. The AAT considered that all matters that affect the decision under review were open.

The issue before the AAT was whether the DSS properly issued notices under s.162 of the 1947 Act to institutions at which Kalwy held bank accounts. This in turn depended on whether a debt was due and owing to the Commonwealth under s.246(1) of the 1947 Act. For the DSS to succeed, it would be necessary to show first, the Kalwy was a co-conspirator in the fraud; secondly, that payments of benefits were made; thirdly, that those payments were made as a result of the fraud and would not have otherwise been made; fourthly, that Kalwy received the payments made.

Was Kalwy a co-conspirator in the fraud?

In considering the degree of proof required to establish that Kalwy was a party to the fraud, the AAT adopted the approach of Davies J in *Letts* (1984) 7 ALD 1; the AAT would have to be satisfied of the matter on the balance of probabilities, but since the allegation was of criminal behaviour it would need to be well proved.

The AAT found it was unsafe to rely on the testimony of two alleged co-conspirators whose evidence tended to implicate Kalwy. There were also taped telephone conversations between other co-conspirators which tended to incriminate Kalwy, but these were equivocal and without corroboration could not support a finding against him.

The AAT examined Kalwy's savings patterns before, during and after the period of the fraud. The bank records indicated a surprisingly high savings rate during the period of the fraud for one on Kalwy's salary, but there was no evidence to contradict his explanations of low expenses, good and regular winnings from betting, and car loan repayments from his brother. The financial evidence was equivocal, and was insufficient to allow for the drawing of an inference that Kalwy was involved in the fraud.

Given the serious nature of the allegations, the AAT could not on the material before it find, on the balance of probabilities, that Kalwy was a party to the conspiracy. The AAT was therefore unable to find that he owed a debt to the Commonwealth under s.246. It followed that the notice under s.162 should not have been issued, and Kalwy was entitled to a refund of the $20,711 recovered from him.

Formal decision

The AAT therefore affirmed the decision under review.

[P.O'C.]

Compensation payments: lump sum or periodic?

SECRETARY TO DSS and KAESE (No. 9499)

Decided: 27 May 1994 by D.J.Grimes, M.E.C.Thorpe and J.Kalowski.

The DSS asked the AAT to review a SSAT decision that the sum of $11,392 received by Ms Kaese as a compensation payment was a lump sum for the purposes of the Act.

The facts

In December 1987 Kaese suffered a work-related injury. From August 1989 to April 1992 she received disability support pension (DSP). In March 1992 she was awarded compensation for her injury. This award included a weekly payment of $80 from 26 July 1989 and continuing. On 1 May 1992 the DSS issued a recovery notice for a debt of $11,392. The debt was stated to have been incurred from 2 August 1989 to 20 April 1992 for which period Kaese received DSP and workers compensation payments. This amount was recovered directly from the insurer in May 1992.

Kaese appealed to the SSAT against the decision to recover this amount. In July 1992 the SSAT determined that the amount paid as workers compensation was a lump sum payment and not periodic payments. The SSAT returned the matter to the DSS for recalculation of the debt.

Was the payment a lump sum payment or periodic payments?

The DSS argued that the payment could only be characterised as periodic payments as it was stated in the settlement order that compensation was to be at the weekly rate of $80 and that weekly payments were to continue. Although some of the payment was received in a lump sum, it represented weekly arrears. Reference was made to *Chahoud* (1993) 28 ALD 927 and *Blunn and Cleaver* (1994) 77 *SSR* 1131 in submitting that the nature of the payment must be considered and not the method of payment.

The SSAT relied on the decision of the Tribunal in *Smallacombe* (1991) 63 *SSR* 880. The AAT had there decided that a single payment received as compensation for loss of earning over a 6-month period was a lump sum payment. But that decision had not been followed by the Federal Court in *Chahoud*. The Court had decided that such a payment was arrears in periodic payments. A similar view was expressed in *Cleaver*. It was the nature of the payment rather than the manner in which it was paid that must be considered.

The Tribunal noted:

> 'The terms of the compensation award in the present case clearly state that compensation was awarded on the basis of weekly compensation payments of $80 per week from 26 July 1992. The only express provision for a lump sum payment is made in clause 3 of the order which awarded the respondent an additional $5433 plus interest for permanent impairment of her back. It is accepted that the respondent actually received an amount of compensation in the form of a single payment. However, it is clear from the terms of the settlement order that such payment was based on the calculation of an award of $80 per week from an earlier date, namely 26 July 1989'.

(Reasons, paras 10-11)

Thus the AAT concluded that the payment was a series of periodic payments and not a lump sum payment. According to s.1170 the amount of the debt is the lesser of the sum of the periodic payments or the sum of the